statute forbidding the judges to express any opinion on the facts is to increase the necessity for new trials — and the multiplication of new trials is one of the worst evils of our system of procedure. The law reports of states where there are such statutes are full of such cases. Too often the granting of new trials means that the party with the longer purse will be successful. That is unjust; it is undemocratic.

Another very serious effect of taking from the judges their traditional power of supervising the conduct of the trial is to deter from accepting judicial office those who are best qualified. The whole system of trial by jury is dependent for its success as an efficient instrument in the administration of justice upon the competence of the judge who presides at the trial. In the admirable preliminary report on "Efficiency in the Administration of Justice" prepared for the National Economic League by President Eliot, Mr. Justice Brandeis, Dean Pound, Mr. Moorfield Storey and Mr. Adolph J. Rodenbeck, it is said:[6] "In most jurisdictions there is too little power of guidance of the jury by the court. Juries are left at large to be swayed by advocacy with no judicial corrective. It is often said that we cannot trust our judges to exercise the common-law power of advising juries. But if we cannot provide a type of judge adequate to the demands of the judicial office, we must not expect the administration of justice to be efficient."

The efficient administration of justice is a matter of the most vital concern to the future of this country. There can be no question that the federal courts, upon the whole, have been very efficient. This has been due in no small part to the fact that the federal judges have retained the power of supervising and controlling the conduct of the trial. It would be a mistake, merely because there may have been dissatisfaction in some isolated instances with particular federal judges, to deprive the federal courts throughout the country of the power to administer justice. Indeed, it would be more than a mistake — it would be a tragedy.

THE LEGISLATIVE MINIMUM WAGE. — Proponents of social "legislation based on hopes rather than regrets" [1] have reason for satisfaction in recent triumphs of realism in the field of constitutional law.[2] The sustaining of the Oregon ten-hour law for factory workers [3] has been followed by the affirming of the constitutionality of statutes in Oregon,[4] Arkansas,[5] and Minnesota,[6] prescribing a minimum wage for women and minors in industry. Those who consider these measures

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[6] Page 26.

[1] See O. W. Holmes, "Ideals and Doubts," 10 ILL. L. REV. 1.

[2] See Felix Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 HARV. L. REV. 353.

[3] Bunting *v.* Oregon, 243 U. S. 426 (1917). See 28 HARV. L. REV. 89.

[4] Oregon Minimum-Wage Cases: Stettler *v.* O'Hara, 69 Ore. 519, 139 Pac. 743 (1914); Simpson *v.* O'Hara, 70 Ore. 261, 141 Pac. 158 (1914), 243 U. S. 629. The Oregon law was upheld by an equally divided court. There was no opinion. Mr. Justice Brandeis took no part in the decision.

[5] State *v.* Crowe, 197 S. W. 4 (Ark.) (1917).

[6] Williams *v.* Evans, 165 N. W. 495 (Minn.) (1917).

paternalistic, socialistic [7] departures from the "American conception" [8] of individualism, subversive of ordered liberty, have fulminated with a wealth of imprecatory Latin, but have not dissuaded the courts from "shaping their conclusions on the solid anvil of existing industrial facts." [9] Judgment by speculation [10] has given way to judgment deferring to scientifically recorded experience whose import was potent in turn to convince lawmakers of the expediency of the new legislation and judges of its reasonableness.[11]

Eleven states have enacted minimum-wage laws. Ohio, by constitutional amendment, has invested its legislature with specific authority to pass such an act. New York and Idaho have created commissions to investigate minimum-wage legislation. Statutes for the establishment of a minimum or living wage have thus far been designed solely for the protection of women and minors. Compulsory and noncompulsory statutes are found. Massachusetts [12] and Nebraska [13] have adopted the noncompulsory type. The minimum-wage commission has authority to fix a living wage, but the employer is under no direct penalty if he is recalcitrant. His name, however, may be included in a blacklist which newspapers are obliged to publish when requested by the commission. Compulsory statutes are of two kinds. In the first class the statutory wage is fixed by a commission through wage boards. The order of the commission when finally promulgated is binding on the employer. California,[14] Colorado,[15] Kansas,[16] Minnesota,[17] Oregon,[18] Washington,[19] and Wisconsin [20] have statutes of this kind. The second type of compulsory statute is found only in Arkansas [21] and Utah.[22] The terms of the statute fix the statutory minimum wage, without providing for investigation and determination by a commission or

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[7] See Rome G. Brown, "Oregon Minimum Wage Cases," 1 MINN. L. REV. 471, 486.

[8] McCulloch, C. J., dissenting in State *v.* Crowe, *supra*, note 5.

[9] See Henry Bourne Higgins, "A New Province for Law and Order," 29 HARV. L. REV. 13, 25.

[10] *Cf.* Lochner *v.* New York, 198 U. S. 45 (1905).

[11] The minimum-wage law compels a provision for the deficit between the amount necessary to maintain the laborer at normal efficiency and the amount he receives. It denies the right of any industry to be a parasite. It protects enlightened employers from cut-throat competition made possible by getting labor at less than cost. It prevents unfair competition among the workers. The apprehension that the minimum wage would become the maximum, that industry would be disorganized, and that the public would suffer in many ways, does not seem to have been well founded. See the annual reports of the minimum-wage commissions of Massachusetts, California, Oregon, Washington, and Minnesota.

[12] MASSACHUSETTS ACTS, 1912, c. 706; 1913, c. 673, 330; 1914, c. 368; 1915, c. 65; 1916, c. 303.

[13] NEBRASKA LAWS, 1913, c. 211.

[14] CALIFORNIA STATUTES, 1913, c. 324; 1915, c. 571. A constitutional amendment authorizing a minimum-wage law was referred to the people and adopted November 3, 1914.

[15] COLORADO LAWS, 1913, c. 110.

[16] KANSAS LAWS, 1915, c. 275.

[17] MINNESOTA LAWS, 1913, c. 547.

[18] OREGON LAWS, 1913, c. 62; 1915, c. 35.

[19] WASHINGTON LAWS, 1913, c. 174; 1915, c. 68.

[20] WISCONSIN LAWS, 1913, c. 712.

[21] ARKANSAS LAWS, 1915, Act 191.

[22] UTAH LAWS, 1913, c. 63.

wage board in the original instance. American statutes show the influence of Australasian legislation, but no state has yet attempted such a radical interferance with the contracts of employer and employee as is common in the antipodes.[23]

The principal objection to the constitutionality of the minimum wage is that it interferes with the freedom of contract of both employer and employee. The right to the acquisition of property and hence to freedom of contract is protected by the Fourteenth Amendment. The minimum-wage laws undoubtedly operate as a deprivation of liberty and property. So do all exercises of the police power. To be legitimate the exercise of the police power must be in the interest of the public health, safety, or morals. A situation in which the police power impinges upon the liberty guaranteed by the federal constitution is obviously not one for "trafficking in absolutes." Freedom of contract can be only a qualified right. Law is forced to adapt itself to new conditions in society induced by new relations between employers and employees.[24] The legislature must possess a wide discretion not only to determine the public interests requiring protection, but the most convenient means for consummating this protection. If the end aimed at is within the scope of constitutional legislative power, if the means selected are reasonably calculated to accomplish the legitimate purposes, no judicial doubt of the expediency of the legislation or of its essential wisdom should interfere with the state's right to conduct rational experimentation.[25] Unless the measure is arbitrary, wanton, and a spoliation it is within due process.

The state, it has been held, may regulate the hours of labor of women,[26] or of men, at least in occupations hazardous to health,[27] and when employed on public work.[28] It may specify the time, manner, and method

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[23] A convenient collection of American and foreign minimum-wage laws and a comprehensive bibliography may be found in the brief for Defendant-in-Error in the Oregon minimum-wage cases. This brief by Professor Frankfurter (assisted by Miss Josephine Goldmark) has been reprinted by the National Consumers' League. See also STATE FACTORY INVESTIGATING COMMISSION (N. Y.), FOURTH REPORT, 1915, Vol. IV, Appendix VIII. Australasia seems well on the way to the development, both by statute and decision, of a distinct body of industrial law. See W. Jethro Brown, "The Judicial Regulation of Industrial Conditions," 27 YALE L. J. 427.

[24] Professor Frankfurter in his brief cited *supra*, note 23, suggests that the vital consequences which justify the imposition of the minimum living cost of labor upon the employer flow from the relationship of employer and employee. In other words, the employer has a relational responsibility to the employee. Professor Frankfurter argues that the center of gravity of the modern state is industry, just as in feudal days it was land. The law may work out reciprocal liabilities from modern industrial relationships just as it evolved the incidents of feudal tenure. See Edward A. Adler, "Business Jurisprudence," 28 HARV L. REV. 135; *Id.*, "Capital, Labor, and Business at Common Law," 29 HARV. L. REV. 241.

[25] *Cf.* Wilcox *v.* Consolidated Gas Co., 212 U. S. 19 (1909); Noble State Bank *v.* Haskell, 219 U. S. 104 (1911); The Adamson Law, Wilson *v.* New, 243 U. S. 332 (1917).

[26] Muller *v.* Oregon, 208 U. S. 412 (1908); Miller *v.* Wilson, 236 U. S. 373 (1915); Ritchie *v.* Wayman, 244 Ill. 509, 91 N. E. 695 (1910).

[27] Holden *v.* Hardey, 169 U. S. 366 (1898); Bunting *v.* Oregon, 243 U. S. 426 (1917). But see *In re* Morgan, 26 Colo. 415, 58 Pac. 1071 (1899); Commonwealth *v.* Boston & Maine R.R., 222 Mass. 206, 110 N. E. 264 (1915).

[28] United States *v.* Martin, 94 U. S. 400 (1876); Atkin *v.* Kansas, 191 U. S. 207 (1903).

of payment.[29] Much of this legislation is upheld on much the same ground as that which justified equity's interference in favor of the necessitous. "Necessitous men," says Lord Northington,[30] "are not, strictly speaking, free men." Real freedom of contract can exist only between those substantially equal in bargaining power. The fundamental basis for sustaining social legislation, however, is that it is within the scope of reasonable legislative action.[31] The broad powers of the legislature over the dealings of men have long been familiar in case of usury statutes. Here as in the statutory minimum wage the public purpose is the prevention of coercive and oppressive contracts.[32] The realistic studies of industrial conditions point so emphatically to an affirmative enhancement of human values as a result of the minimum wage that counsel in support of the laws have probably been able to convince the courts not only of the reasonableness of the legislation, but also of its wisdom and timeliness. Chivalric concern for women is conspicuous in opinions on minimum-wage cases, but behind this is the recognition of the narrow function of the court in passing upon social legislation. Under the principles of recent decisions no statute supported by a respectable body of opinion and justified by honest testing should fail, if counsel are reasonably diligent in the collection of realistic data.

The liberal attitude of American courts toward labor legislation should rehabilitate the judiciary in the favor of social groups whose purposes and ideals are discordant with the aspirations of the groups from which judges are chiefly drawn. All of the complementary organs in a political system of checks and balances are instituted for the better expression of the public will. No branch of our tripartite scheme of government can permanently maintain its prestige if it is reputed consistently to deny popular demands. The profession of the law, highly skilled in the science of human conduct and deeply appreciative of its complexities, must not acquire an incubus of unpopularity which will deprive our democratic society of its logical leadership. The trend of recent decisions in the Supreme Court of the United States certainly shows no tendency to slumber upon the *formulae* of a decadent social and economic philosophy.[33] With this example lesser lawyers have no warrant for posing as "priests of a completed revelation." The liberalism that recognizes and welcomes rational evolution of political institutions to conform

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[29] Knoxville Coal & Iron Co. *v.* Harbison, 183 U. S. 13 (1901) · McLean *v.* Arkansas, 211 U. S. 539 (1909) But see Godcharles *v.* Wigeman, 113 Pa. 431, 6 Atl. 354 (1886).

[30] Vernon *v.* Bethell, 2 Eden, 110, 113 (1762). See FREUND, POLICE POWER, §§ 316 *et seq.*, 500 *et seq.* See also Roscoe Pound, "Liberty and Contract," 18 YALE L. J. 454, 482.

[31] "The question, therefore, is not whether the state can regulate hours of labor . . . but what evils are manifest, and what tendencies are disclosed, that present a reasonable field for legislative encouragement. This field of reasonable action is the state police power." Felix Frankfurter, *arguendo*, Bunting *v.* Oregon, 243 U. S. 426, 431 (1917).

[32] See Thomas Reed Powell, "The Constitutional Issue in Minimum-Wage Legislation," 2 MINN. L. REV. 1.

[33] See Rast *v.* Van Deman & Lewis Co., 240 U. S. 342, 365 (1915); Otis *v.* Parker, 187 U. S. 606, 608, 609 (1903); Hurtado *v.* California, 110 U. S. 516, 530, 531, 537 (1884).

with changing social and economic needs and hopes is committed, seemingly, to a program of positive social legislation. Without capacious sympathy with the purposes of this legislation and comprehensive understanding of the social will promulgating it, the lawyer will not be accorded his deserved dignity and authority. With an acute societal sensibility he may expect the responsibility that devolves in course upon the living successors of the historic molders of human institutions.[34]

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS. — Nearly two decades and a half ago one of our courts — seized of a prophetic mood — expressed the opinion that the protection of the right of contract and of subsisting contractual relations against the tortious interference of third parties is "a subject which is likely to be one of the most important and difficult which will confront the courts during the next quarter of a century."[1] Events have certainly vindicated the prophecy. Most of the problems involved still remain unsolved, and many of them are just beginning to present themselves to the courts. Beginning with the clear recognition in *Lumley* v. *Gye*[2] of the interest of a party in a contractual relation as a right *in rem*, a right of property, which will be protected against intentional infringement by third parties, the courts have been groping along in a steady effort to evolve a logical and harmonious system for the securing of this property interest.[3] While some of the earlier cases suggested the limitation of the doctrine to contracts of employment,[4] it has been generally extended to include contract rights of every description.[5] And it may now be considered the established rule

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[34] See Learned Hand, "The Speech of Justice," 29 HARV. L. REV. 617, 618, 621.

[1] Bohn Mfg. Co. *v.* Hollis, 54 Minn. 223, 231, 55 N. W. 1119 (1893).

[2] 2 E. & B. 216 (1853).

[3] Even Blackstone, however, speaking of two sorts of injuries to the rights of the master, growing out of the relation of master and servant, says (3 BL. COM. 142): "The one is, the retaining a man's hired servant before his time is expired; the other is beating or confining him in such a manner that he is not able to perform his work. . . . Every master has, by his contract, purchased for a valuable consideration the services of his domestics for a limited time. The inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by special action on the case; and he may also have an action against the servant for the non-performance of his agreement. But if the new master was not apprized of the former contract, no action lies against him, unless he refuses to restore the servant upon demand. The other point of injury is that of beating, confining or disabling a man's servant, which depends upon the same principle as the last, to wit, the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment which the servant himself as an individual may have against the aggressor, the master also, as a recompense for his immediate loss, may maintain an action of tresspass *vi et armis*. . . ."

[4] See Allen *v.* Flood, [1898] A. C. 1; Boyson *v.* Thorne, 98 Cal. 578, 33 Pac. 492 (1893).

[5] Quinn *v.* Leathem, [1901], A. C. 495; Walker *v.* Cronin, 107 Mass. 555 (1871); Morgan *v.* Andrews, 107 Mich. 33, 64 N. W. 869 (1895); Rice *v.* Manley, 66 N. Y. 82 (1876); Angle *v.* Chicago, etc. Ry. Co., 151 U. S. 1 (1893). *Contra*, Chambers *v.* Baldwin, 91 Ky. 121, 15 S. W. 57 (1891); Glencoe Land, etc. Co. *v.* Hudson Bros. Commission Co., 138 Mo. 439, 40 S. W. 93 (1897).